

NY 46th LLC v Kinloch Mktg., Inc.

2009 NY Slip Op 31637(U)

July 16, 2009

Supreme Court, New York County

Docket Number: 110869/08

Judge: Doris Ling-Cohan

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 110869/2008

NY 46TH LLC

VS.

KINLOCH MARKETING

SEQUENCE NUMBER : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for summary judgment

PAPERS NUMBERED

1, 2

3

4, 5

6

to dismiss

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

for summary judgment is granted in accordance with the attached memorandum decision; the cross-motion to dismiss is denied in accordance with the attached memorandum decision.

FILED

JUL 23 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: _____

[Signature]

HON. DORIS LING-COHAN S.C.

[Signature]

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----x
NY 46th LLC,

Plaintiff,

-against-

Index No: 110869/08

KINLOCH MARKETING, INC. and NANCY K. MOORE
a/k/a NANCY KINLOCH POTTER,

Motion Seq. No.: 001

Defendants.
-----x

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

LING-COHAN, J.:

Plaintiff NY 46th LLC, moves pursuant to CPLR 3212, for an order directing the entry of summary judgment on its first and fourth causes of action against its former tenant, Kinloch Marketing, Inc. (Kinloch), and Nancy K. Moore a/k/a Nancy Kinloch Potter (Moore), the guarantor of the commercial lease at issue in this lawsuit, and granting the immediate entry of a judgment for unpaid rent in the amount of \$59,604.72, together with interest from August 1, 2008. Plaintiff also moves for summary judgment as to liability on the remaining causes of action for attorneys' fees and the costs and expenses of re-letting the premises, and for an inquest to determine these amounts. Defendants cross-move to dismiss the action based upon lack of standing, lack of personal jurisdiction, and failure to state a cause of action.

FACTUAL ALLEGATIONS

On July 1, 1996, Kinloch, a commercial tenant, entered into a lease for the premises located at 20 East 46th Street, Suite 1401, in Manhattan with 20 East 46th Street Associates, Inc. The lease was for the term of September 1, 1996 through August 31, 2006. In order to induce the execution of the lease, on June 14, 1996, Moore executed, acknowledged, and delivered to 20 East 46th Street Associates, Inc., a guaranty of the lease which runs to the benefit of 20 East 46th

Street Associates, Inc. and its successors and assigns.

On December 31, 1996, 20 East 46th Street Associates, Inc. assigned all of its rights and interest in the lease to 20 East 46th Associates, LLC. Thereafter, on August 10, 1998, 20 East 46th Associates, LLC, assigned all of its rights to 20 East 46, LLC, who subsequently assigned all of its rights and interests to plaintiff on March 9, 2006. An amendment of the lease was entered into on September 1, 2006, between plaintiff and Kinloch and extended the lease until February 28, 2017. Pursuant to paragraph 3 of the amendment, Kinloch covenanted and agreed to pay base rent in the sum of \$6,743.33 per month beginning on September 1, 2006 and ending on February 28, 2009; Moore also ratified the terms of the guaranty in the amendment.

Kinloch failed to pay base rent and additional rent for January and February of 2008. Therefore, plaintiff commenced a commercial summary nonpayment proceeding in the Civil Court of the City of New York, New York County, seeking, among other relief, to remove Kinloch from the premises.

On July 16, 2008, the City Marshall evicted Kinloch from the premises pursuant to a judgment of possession and a warrant of eviction which were issued in the context of the nonpayment proceeding. Kinloch also failed to pay base rent and additional rent for the months of March, April, June, and July, and plaintiff maintains that pursuant to paragraph 18 of the lease, it is also entitled to recover rent and additional rent for the month of August of 2008. Plaintiff contends that it is owed a total of \$59,604.72 along with the past due sum with interest from August 1, 2008, and that the lease obligates Kinloch to pay plaintiff's reasonable attorneys' fees, costs and disbursements as well as all reasonable costs incurred by plaintiff in connection with its attempt to re-let the premises.

Plaintiff maintains that Moore, as guarantor, is obligated to pay the principal sum of \$59,604.72 together with appropriate legal interest from August 1, 2008. The guaranty also obligates Moore to pay plaintiff all of the attorneys' fees and disbursements in connection with the enforcement of the guaranty, as well as all reasonable costs and expenses incurred by plaintiff in connection with its attempts to re-let the premises.

DISCUSSION

The Court of Appeals has held that “[a]n agreement to pay rent on a certain date is generally a material term of a lease.” *Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 8 NY3d 59, 65 (2006); *see also Fifty States Mgt. Corp. v Pioneer Auto Parks, Inc.*, 46 NY2d 573, 578 (1979). Here, there is no dispute that the parties had a valid lease, that Kinloch breached the lease by failing to pay rent and additional rent through the time of its eviction in July of 2008, and that due to the failure to pay rent, Kinloch was evicted from the premises. The lease also clearly provides that Kinloch is liable to plaintiff for any expenses plaintiff has in its attempt to re-let the premises including legal expenses, reasonable attorneys fees, brokerage and advertising costs.

Plaintiff also maintains that summary judgment against Moore is warranted because Moore was the guarantor of Kinloch under the lease and has subsequently failed to pay the past-due rent. The First Department had held that “[o]n a motion for summary judgment to enforce a written guaranty, all that the creditor need prove is an absolute and unconditional guaranty, the underlying debt, and the guarantor’s failure to perform under the guaranty.” *City of New York v Clarose Cinema Corp.*, 256 AD2d 69, 71 (1st Dept 1998).

Here, the guaranty specifically states that it will remain in effect as to any renewal,

modification, extension, or assignment of the lease and the amendment states that the guaranty is absolute and unconditional. Because defendants fail to produce evidence that they paid the past-due rent or that plaintiff does not have the right to enforce the guaranty against Moore, plaintiff is entitled to summary judgment against Moore as well as Kinloch.

In opposition to plaintiff's motion for summary judgment, defendants contend that the complaint should be dismissed for improper service of process. This aspect of defendants' cross motion is denied as untimely. Pursuant to CPLR 3211 (e), a motion to dismiss based upon improper service of process must be denied if it is not made within sixty days after service of the answer. Here, defendants' answer was served on September 22, 2008 and defendants' cross motion was not made until December 8, 2008, beyond the sixty-day period after service of defendants' answer. Defendants contend that their cross motion is timely because it relates back to plaintiff's motion-in-chief, which was originally returnable on November 10th, and thereafter adjourned twice on consent. However, the first stipulation which adjourned the plaintiff's motion from November 10th to December 5, 2008, makes no mention of any cross motion, asserts only that defendants' opposition to the summary judgment motion would be served by November 24, 2008, and does not contain a court-ordered extension of CPLR 3211 (e)'s 60-day time limit on the basis of "undue hardship."

Moreover, even if the court were to entertain defendants' defense of improper service of process, the defense lacks merit. Moore avers that service on Kinloch via the Secretary of State was improper, because plaintiff was aware that Kinloch moved out of the premises which it previously occupied and failed to update its address with the New York Secretary of State. However, it remains the responsibility of Kinloch to update its address with the Secretary of

State. *See NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576, 577 (1st Dept 2007); *Cedeno v Wimbledon Bldg. Corp.*, 207 AD2d 297, 298 (1st Dept 1994).

Moore also contends that personal service upon her was also defective. Pursuant to CPLR 308 (1), to effectuate personal service, a summons must be personally delivered within the state to the person to be served. Because plaintiff was located in Maine, according to CPLR 313, service is still good if made by any person authorized to make service within the state who is a resident of the state or by any person authorized to make service by the laws of the foreign jurisdiction, or by a qualified attorney in such jurisdiction.

Although Moore does not dispute that, on August 20, 2008, the summons and complaint were personally delivered to her in Maine by an authorized process server, she maintains that the affidavit of service is defective because it does not contain her legal description. Despite this assertion, counsel for plaintiff attaches the second page of the affidavit of service to his reply affirmation, which was filed with the County Clerk on September 4, 2008 and includes Moore's description.

Moore also maintains that service via "nail and mail" to her second home in Amagansett, New York, was improper. CPLR 308 (4) provides that where service under CPLR 308 (1) and (2) cannot be made with due diligence, the process server may affix the summons to the actual place of business, dwelling place, or usual place of abode of the individual to be served, and within 20 days, mail another copy to the defendant's last known residence or actual place of business in an envelope marked "personal and confidential." Here, the process server visited the Amagansett home of Moore on August 14, 2008 at 7:48 a.m., August 16, 2008 at 5:10 p.m., and August 19, 2008 at 2:15 p.m. After affixing the summons and complaint to the door of Moore's

residence, the process server mailed a copy to said residence within 7 days.

Although Moore contends that the attempts to serve her in Amagansett were not made before or after business hours, the attempts were made as early as 7:48 a.m. on a weekday morning and on a Saturday afternoon. Because plaintiff made three different attempts of service, on three different days and times, Moore's argument that the "nail and mail" method was not complied with and lacked due diligence, is without merit. *See Ayala v Bassett*, 57 AD3d 387, 388 (1st Dept 2008); *Brown v Teicher*, 188 AD2d 256, 256 (1st Dept 1992).

Defendants have failed to raise a triable issue of fact as to any remaining defense, to preclude the granting of summary judgment in plaintiff's favor.

Defendants contend that plaintiff does not have standing to maintain this action because it is not the true lessor of the premises. However, plaintiff submits a copy of the amendment of the lease which Kinloch entered into directly with plaintiff on September 1, 2006, and which Moore reaffirmed. Therefore, defendants were aware that they had a direct contractual relationship regarding the premises with plaintiff.

Furthermore, despite defendants claim that there is a break in the chain of the assignments of the lease, plaintiff submits copies of the lease, the amendment, the guaranty, and the assignment and assumption of the lease agreement. The lease and guaranty were executed between 20 East 46th Street Associates, Inc. as lessor and Kinloch and Moore in July of 1996. On December 31, 1996, 20 East 46th Street Associates, Inc., assigned all of its rights and interest in the lease to 20 East 46th Associates, LLC. Thereafter, on August 10, 1998, 20 East 46th Associates, LLC, assigned all of its rights to 20 East 46, LLC, who subsequently assigned all of its rights and interests to plaintiff on March 9, 2006.

Defendants' argument that plaintiff has failed to comply with conditions precedent to commencing this action is also flawed because no predicate notices were required to be served upon Kinloch under the lease and Kinloch was served with a written three-day demand when rent became due. By signing the guaranty, Moore reaffirmed the terms of the lease and waived all rights to notice under the lease.

The second and third affirmative defenses of waiver and estoppel are also without merit. In regards to the defense of waiver, defendants fail to submit any evidence or make allegations that plaintiff relinquished or waived any of its rights. *See Hadden v Consolidated Edison Co. of N.Y.*, 45 NY2d 466, 469 (1978) (holding that a waiver may be made by "[an] express agreement or by such conduct or failure to act as to evince an intent not to claim the purported advantage"). Furthermore, although defendants argue that plaintiff's claims are barred under the doctrine of estoppel, defendants fail to specify as to what extent they relied on plaintiff's inconsistent conduct, how they were prejudiced, or offer any evidence that plaintiff did not act expeditiously in enforcing its rights after Kinloch's eviction from the premises. *See Investors Ins. Co. of America v Hartford Fire Ins. Co.*, 233 AD2d 197, 197 (1st Dept 1996) (holding a claim for estoppel must be rejected because it fails to demonstrate reliance on the conduct of plaintiff or any prejudicial change in position of defendant).

The fifth affirmative defense alleges that plaintiff failed to mitigate its damages. Although Moore contends that instead of mitigating its damages, plaintiff entered into a scheme with the sub-tenants to create defendants' default by instructing the sub-tenants not to pay rent, such allegations are speculative and defendants only support these allegations with an inconclusive e-mail attached to Moore's affidavit. Moreover, "there is no duty to mitigate

damages in a commercial lease setting.” *11 Park Place Assocs. v Barnes*, 202 AD2d 292, 293 (1st Dept 1994); *see also Country Glen, L.L.C. v Himmelfarb*, 4 Misc 3d 1015[A], 2004 WL 1852889, *9 (Sup Ct, NY County 2004).

Defendants also raise the affirmative defense of constructive eviction, however in order to assert this defense, the tenant must have abandoned the premises. *See The Gallery at Fulton St., LLC v Wendnew LLC*, 30 AD3d 221, 221 (1st Dept 2006). Here, there is no evidence presented by Kinloch that it abandoned the premises, but rather, Kinloch was evicted as a result of its failure to pay rent and the nonpayment proceedings.

Finally, despite plaintiff’s request to impose sanctions on defendants for the filing of the cross motion is denied; the cross-motion is not frivolous within the meaning of 22 NYCRR 130-1.1.

CONCLUSION and ORDER

Accordingly, it is hereby

ORDERED, that plaintiff NY 46th LLC’s motion for summary judgment on the first and fourth causes of action is granted and the Clerk of the Court is directed to enter judgment in favor of plaintiff and against defendants Kinloch Marketing, Inc. and Nancy K. Moore a/k/a Nancy Kinloch Potter in the amount of \$59,604.72, together with interest as prayed for allowable by law from August 1, 2008, until the date of entry of judgment as calculated by the Clerk, and thereafter at the statutory rate, together with costs and disbursements to be taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff’s motion for summary judgment on liability with respect to the second, third, fourth and fifth causes of action for attorneys’ fees and costs and expenses

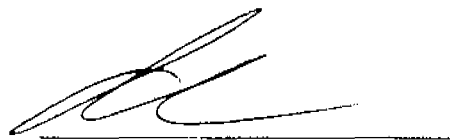
associated with re-letting the premises is granted; and it is further

ORDERED that the amount of reasonable attorneys' fees and costs and expenses associated with the re-letting of the premises plaintiff may recover against the defendants on the second, third, fourth and fifth causes of action is severed and referred to a Special Referee to hear and determine, as permitted by CPLR 4317 (b); and it is further

ORDERED that counsel for the plaintiff shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119), who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; failure to timely comply with this order, will be deemed a waiver of plaintiff's claim for attorneys' fees and costs; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: July 16, 2009



Hon. Doris Ling-Cohan, J.S.C

J:\Summary Judgment\NY46thLLCvKinloch-testa.wpd.

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK